Supreme Court, U.S.
FILED
DEC - 3 1993
OFFICE OF THE CLERK

93-883

No.

In the Supreme Court of the United States

OCTOBER TERM, 1993

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

OVERLAND EXPRESS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether, under the filed rate doctrine, a motor carrier may collect a tariff rate that contains only one of two components necessary to establish a mileage-based rate, notwithstanding the Interstate Commerce Commission's longstanding interpretation of its rules governing tariff filing that such a tariff is void as a matter of law.

PARTIES TO THE PROCEEDING

The parties to the proceeding below were the Interstate Commerce Commission; the United States; Overland Express, Inc.; Jasper Wyman & Sons; Codep International; Creamette Co; Lynn Plastics Corp.; Viviano Macaroni; Furniture Crafts, Inc.; Fibers & Fabrics of Georgia; Cotter & Co.; Distribution Transportation Service, Inc.; Country Oven, Inc.; Grinnell Corp.; Purolator; Thompson Consumer; Rudy's Farm Co.; S.T. Semicon; General Motors Corp.; Kroger Co.; Drexel Co.; Alcan Aluminum Corp.; Bear Transportation; BI LO, Inc.; Charley Brothers; Warner Lambert, LTD.; Zarn, Inc.; Anderson Window Corp.; Chase Fitzpatrick, LTD; Davis Distribution; Life Savers, Inc.; Witco Corp.; Greenman Brothers; L.B. Transport; MSG Arlen Co.; Kraft, Inc.; MTI Freight Systems; Old Dutch Food, Inc.; Marathon Electric Manufacturing Corp.; and Preferred Products.

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OVERLAND EXPRESS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Interstate Commerce Commission and the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, 1a-15a, is reported at 996 F.2d 356. The decision of the Interstate Commerce Commission, App., *infra*, 16a-42a, is reported at 8 I.C.C.2d 246.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1993. A petition for rehearing was denied on September 22, 1993. App., *infra*, 43a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Interstate Commerce Act, 49 U.S.C. 10761, 49 U.S.C. 10762(a), and 49 U.S.C. 10762(b)(1), and the pertinent regulations of the Interstate Commerce Commission, 49 C.F.R. 1312.30, 49 C.F.R. 1312.27(e), 49 C.F.R. 1312.10(a), and 49 C.F.R. 1312.4(d), are set forth in the appendix. App., *infra*, 45a-53a.

STATEMENT

The Interstate Commerce Commission (ICC or Commission) determined in this case, under longstanding ICC regulations, that a motor carrier that refers in its tariff to a separately filed mileage guide in order to state its shipping rates must "participate" in the separately filed guide, and that a carrier's failure to participate in the mileage guide renders its tariff void. The court of appeals rejected that conclusion, holding that the ICC's rule as applied in this case "constitutes a retroactive tariff rejection in excess of [the Commission's] statutory authority and violates the filed rate doctrine." App., *infra*, 15a.

1. The Interstate Commerce Act (Act) requires that interstate motor common carriers publish their shipping rates in tariffs filed with the ICC. 49 U.S.C. 10761, 10762(a)(1). The carrier "may not charge or receive a different compensation for that transportation * * * than the rate specified in the tariff." 49 U.S.C. 10761(a). The Act authorizes the ICC to administer and enforce those statutory requirements, 49 U.S.C. 10321(a), 11701, 11702, and, in particular, to "prescribe the form and manner" of tariff filing, 49 U.S.C. 10762(b)(1), and the content of filed tariffs, 49 U.S.C. 10762(a)(1).

Although each carrier is responsible for establishing its own rates, see 49 U.S.C. 10702, 10762, a carrier's tariff may incorporate by reference rate components contained in tariffs filed by other carriers or agents. That method of setting forth a rate, however, is permitted only if the carrier formally participates in those other tariffs. 49 C.F.R. 1312.27(e). The Commission's regulations further provide that "a carrier may not participate in a tariff issued in the name of another carrier or an agent unless a power of attorney or concurrence has been executed. *Absent effective concurrences or powers of attorney, tariffs are void as a matter of law.*" 49 C.F.R. 1312.4(d) (emphasis added).

The ICC first articulated its requirements for participating in another carrier's tariff and its rule that a carrier's tariff is void if the carrier allows its participation in a referenced tariff to lapse in *Cancelation of Participation in Agency Tariffs*, 4 Fed. Reg. 4,440 (1939). Those requirements were codified in present form in *Revision of Tariff Regulations, All Carriers*, 1 I.C.C.2d 404 (1984). As the Commission explained in *Wonderoast, Inc.—Transp. Systems International, Inc.*, 8 I.C.C.2d 272, 277 (1992), aff'd *sub nom. Lovett* v. *Wonderoast*, 145 B.R. 40 (Bankr. D. Minn. 1992), the participation requirement promotes the statutory requirement that individual carriers are responsible for establishing rates, by ensuring that a carrier is not bound by the rate actions of another (including revisions to the referenced tariff) unless the carrier has clearly authorized the other to act on its behalf through a continuing agency relationship.

2. This case involves operation of the Commission's void-for-nonparticipation rule with respect to mileage rate tariffs. A mileage rate consists of two indispensable

components: the rate per mile and the distances between shipping points. Those two components are multiplied together to obtain the proper charge for a shipment. App., *infra*, 19a. The carrier can modify a rate by changing either the rate per mile or the distance component of its mileage rate. Thus, both components must be present for a tariff to contain a "rate" that satisfies the carrier's obligation to file its rates with the Commission under 49 U.S.C. 10762(a)(1).

Carriers may establish the distance portion of their mileage rates in three ways: (1) listing the distances between all relevant locations in their tariff; (2) attaching a map to the tariff; or (3) referring to a separately filed distance guide tariff. 49 C.F.R. 1312.30(c)(4); App., *infra*, 19a. When the third method is used, the choice of a distance guide affects the ultimate charge for a shipment, because mileage figures vary depending upon the guide used, and vary even from one edition to the next of the same guide.

The tariffs of Overland Express, Inc., a now-defunct motor carrier, employed the third method; they contained Overland's rates per mile, but referred to the Household Goods Carriers' Bureau (HGCB) Mileage Guide Tariff 100 for distances. App., *infra*, 19a. While in 1970 Overland had submitted a power of attorney to HGCB, in 1982 Overland ceased to pay the fee required to participate in the HGCB Mileage Guide. At that point, Overland's participation lapsed and HGCB, by a tariff filing effective May 22, 1983, removed Overland from the list of carriers that participated in its Mileage Guide Tariff.[1] *Id.* at 5a, 26a-27a.

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[1] HGCB charges an annual fee for carriers to participate in its mileage guide tariffs. If a carrier fails to pay the fee for renewing its participation in the guide, after a number of efforts advising the carrier of the delinquency and the impending cancellation,

After Overland's bankruptcy, its trustee sought to collect undercharges from shippers based on the difference between the rates Overland had actually billed the shippers and the rates purportedly reflected in Overland's tariffs. Numerous shippers who were sued by the trustee petitioned the ICC for a declaratory order that Overland cannot establish undercharge claims based on tariffs that incorporate distances from the HGCB Mileage Guide, because Overland had failed to participate in that tariff as required by ICC regulations. App., *infra*, 16a-17a.

After inviting comments from interested persons and thoroughly considering the relevant issues, App., *infra*, 17a-18a, the Commission determined that Overland is not entitled to rely on its tariffs incorporating the HGCB Mileage Guide for shipments that moved after May 22, 1983, because its tariff rates were incomplete (for lack of the distance component) and "void" by virtue of 49 C.F.R. 1312.4(d). App., *infra*, 18a, 41a. The Commission found that, because Overland had failed to pay the participation fee to HGCB, its participation in HGCB's tariff was cancelled by the public filing made by HGCB.[2] *Id.* at 26a-28a. As a result, the Commission concluded

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HGCB will delete its name as a participant in subsequent editions of the distance guide. The cover page of the HGCB mileage guide tariff states that the distances contained in the guide may be used only by participating carriers whose names are listed. App., *infra*, 27a-28a, 29a & n.23.

[2] The Commission stated that Overland, "as well as the general public, was put on constructive notice of Overland's cancellation by the March 23, 1983, issuance of ICC HGB 101-A Supplement No. 72." App., *infra*, 28a; see *id.* at 26a n.14 (noting that Supplement No. 72 indicated through a "+" sign next to Overland's name that Overland's participation would be terminated effective May 22, 1983).

that, because "Overland's mileage rate tariff had no method to compute mileage, Overland's filed tariffs were incomplete and cannot lawfully support the freight charges sought to be assessed." *Id.* at 18a.

3. The court of appeals granted a petition for review and set aside the Commission's order. The court acknowledged that the Commission's Rule 1312.4(d) explicitly states that a carrier's failure to comply with the participation requirement renders its tariff "void." App., *infra*, 8a. The court ruled, however, that the ICC's application of its rule to "alter the past effects" of a tariff after the tariff had "gone into effect" amounts to a retroactive rejection of Overland's tariff. *Id.* at 8a-9a. Accordingly, the court reasoned that the ICC's application of its rule had to satisfy the two-part test of *ICC* v. *American Trucking Ass'ns*, 467 U.S. 354, 367 (1984), under which the Commission may retroactively reject a tariff only when that action "further[s] a specific statutory mandate" and is "directly and closely tied to that mandate." App., *infra*, 7a, 9a.

The court then held that the retroactive rejection that occurred in this case is unlawful under *American Trucking Ass'ns*. First, the court rejected the ICC's contention that its rule is a "straightforward application of the filed rate doctrine," App., *infra*, 9a, because, in the ICC's view, it prohibits carriers from charging rates that are facially defective under the ICC's rules. *Id.* at 9a-10a. The court stated that, under this Court's cases, "a filed rate is valid despite procedural imperfections and even if it reflects a substantive violation of the [Act]." *Id.* at 10a-11a. The court thus believed that the ICC's approach would undermine the filed rate doctrine, because the shipper could not rely on the filed rate without taking the "extraordinary step" of determining whether

a carrier's power of attorney was up to date. *Id.* at 12a. In the court's view, as long as a tariff is adequate to give notice of the rates meant to be charged, procedural defects do not affect the enforceability of the filed rate. *Id.* at 12a-13a.

Next, the court of appeals disagreed with the Fifth Circuit's holding in *Freightcor Services, Inc.* v. *Vitro Packaging, Inc.*, 969 F.2d 1563, 1572 (1992), cert. denied, 113 S. Ct. 979 (1993), that the ICC's rule "furthers the specific statutory mandate that '[t]he Commission may prescribe other information that motor common carriers shall include in their tariffs.' " App., *infra*, 13a, quoting 49 U.S.C. 10762(a)(1). The court doubted that the void-for-nonparticipation rule advances a "specific statutory mandate" within the meaning of *American Trucking Ass'ns*, rather than advancing regulatory policies of the Commission under its power to prescribe the information required to be stated in tariffs. App., *infra*, 13a. Even if it did, however, the court concluded that the "draconian remedy" of retroactive rejection is not "directly and closely tied" to that power, because less drastic remedies (for example, damages) are available. *Id.* at 13a-14a.[3]

REASONS FOR GRANTING THE PETITION

The courts of appeals are divided on the question whether the Commission's determination in this case constitutes a retroactive rejection of the carrier's tariff and, if it does, whether such a rejection is within the agency's authority under *ICC* v. *American Trucking*

[3] The court of appeals denied a petition filed by the Commission and the United States seeking rehearing, with a suggestion for rehearing en banc. App., *infra*, 43a-44a.

Ass'ns, supra. In *Atlantis Express, Inc.* v. *Associated Wholesale Grocers, Inc.*, 989 F.2d 281, 283 (1993), the Eighth Circuit concluded that, "[b]ecause [the carrier's] tariff was not effectively filed [absent participation in the mileage guide], * * * section 1312.4(d) does not result in the retroactive rejection of a filed tariff." In *Security Services, Inc.* v. *K Mart Corp.*, 996 F.2d 1516 (1993), the Third Circuit concluded that Rule 1312.4(d) effected a retroactive tariff rejection, but that such a result is permissible under the *American Trucking Ass'ns* test. In this case, the District of Columbia Circuit found a retroactive rejection, but concluded that that result is impermissible under *American Trucking Ass'ns.*

On October 18, 1993, this Court granted the petition for a writ of certiorari in *Security Services, Inc.* v. *K Mart Corp.*, No. 93-284, to resolve the circuit split. Because the Court's decision in *Security Services* will likely resolve the issue presented in this case, the Court should hold the petition in this case for disposition in light of its decision in *Security Services.*

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's decision in *Security Services, Inc.* v. *K-Mart Corporation*, No. 93-284, and should be disposed of as is appropriate in light of that case.

Respectfully submitted.

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DECEMBER 1993

APPENDIX A

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 92-1037

OVERLAND EXPRESS, INC., PETITIONER

v.

INTERSTATE COMMERCE COMMISSION, RESPONDENT

JASPER WYMAN & SON, ET AL., HOUSEHOLD GOODS CARRIERS' BUREAU, INC., THE KROGER CO., INTERVENORS

Argued April 20, 1993
Decided June 22, 1993

Before EDWARDS, RUTH BADER GINSBURG, and SILBERMAN, Circuit Judges.

Opinion for the Court filed by Circuit Judge SILBERMAN.

SILBERMAN, Circuit Judge:

Petitioner, a bankrupt carrier, challenges the Interstate Commerce Commission's (ICC's) order declaring that the carrier's rates were never effectively on file with the Commission. We agree with petitioner that the Commission's ruling conflicts with

Supreme Court precedent, and therefore, we grant the petition for review.

I.

In the early 1980s, the federal government began to deregulate the transportation industry. As part of that process, the ICC relaxed many of its cumbersome rate filing and approval procedures with which motor carriers had to comply. Even the new, less stringent, requirements were too burdensome for many carriers who, caught up in the spirit of competition, negotiated rates with shippers without regard to the rates on file with the Commission. In many cases, these negotiated rates were far below the carriers' filed rates.

The shippers gladly accepted these low rates. Most of the shippers must have known that under the filed rate doctrine (which is an integral part of the Interstate Commerce Act (ICA), *see* 49 U.S.C. § 10761(a), and has been consistently followed by the Supreme Court since at least 1915) the carriers had a legal right to collect the full amount of the filed rate no matter how clearly a shipping contract reflected a lower rate. *See Louisville & Nashville R. Co. v. Maxwell,* 237 U.S. 94, 97, 35 S.Ct. 494, 495, 59 L.Ed. 853 (1915) ("Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed."). Presumably the shippers reasoned that carriers would respect the lower negotiated rates because, in a competitive market, a carrier would commit commercial suicide by demanding the filed rate. The shippers apparently did not foresee that the process of opening up a previously heavily regulated market to the forces of competition would push some of the less efficient firms out of the market. And

although the shippers were correct to think that active carriers would not insist on the higher filed rates, the same logic did not apply to the trustees of bankrupt carriers whose only incentive was to increase the size of a bankrupt's asset pool.

By the mid-1980s, a number of trustees had billed shippers for the difference between the filed and negotiated rates and, upon the shippers' refusal to pay, had brought undercharge suits. The shippers understandably characterized these suits as grossly inequitable and argued that the Commission should invalidate the filed rates pursuant to its power to regulate unreasonable practices. The Commission, realizing that the undercharge suits resulted from and were contrary to the spirit of its deregulatory efforts, agreed with the shippers. *See National Indus. Transp. League*, 3 I.C.C.2d 99, 104-08 (1986) (*Negotiated Rates I*); *Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 5 I.C.C.2d 623, 628-34 (1989) (*Negotiated Rates II*).

The Supreme Court, however, when it faced the issue in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 110 S.Ct. 2759, 111 L.Ed.2d 94 (1990), disagreed with the Commission and the shippers. The Court rejected the Commission's determination that the bankrupt carriers' trustees' attempts to recover the difference between the filed and unfiled rates—after they had negotiated, billed, and collected the lower rates—were an unreasonable practice. *See id.* at 130-31, 110 S.Ct. at 2768. The Court held that the Commission's ruling eviscerated the filed rate doctrine and interfered with the ICA's goal of ensuring nondiscriminatory pricing. The purpose of the filed rate doctrine, the Court reasoned, is to prevent carriers from discriminating among custom-

ers, for example, by charging shippers higher rates on less competitive routes. And the filed rate doctrine and the ICA cannot be enforced if carriers (or trustees) are prevented from collecting the filed rate. *See id.* at 132-33, 110 S.Ct. at 2769.

After their blanket challenge to the trustees' undercharge suits was rejected in *Maislin*, shippers had to develop more creative defenses that were designed to avoid running afoul of the filed rate doctrine. This case involves one such attempt.

The trustees of the bankrupt Overland Express sued a number of shippers for undercharges in the Southern District of Indiana. A group of these shippers then filed a petition with the ICC for an order declaring Overland's filed rates invalid. The shippers initiated this petition with the ICC rather than waiting for the district court to refer the cases to the Commission. The court eventually did refer some of the cases, but they were never consolidated with the original petition for declaratory relief.[1]

The shippers' major contention before the Commission was that Overland's tariff referred to a separately filed mileage guide in which Overland had failed to participate, and that therefore its filed rates were defective and void as a matter of law. Under-

[1] The Commission suggests that jurisdiction properly lies in the Southern District of Indiana under 28 U.S.C. § 1336(b), which gives a district court exclusive jurisdiction over cases that it previously referred to the Commission. But § 1336(b) is a narrow exception to our jurisdiction over challenges to Commission proceedings under the Hobbs Act. *See* 28 U.S.C. §§ 2321(a), 2342. We have jurisdiction over this proceeding because it was initiated by the shippers (some of whom never had their cases referred to the Commission), not referred by a district court, and was later supplemented by notice and comment proceedings.

standing the shippers' claim requires a brief overview of the Commission's tariff filing regulations. A mileage rate is one of the methods that a carrier can use to charge shippers. It consists of two parts: a rate per mile and a distance between shipping points. A carrier will usually list the rate per mile in its filed tariff and can supply the distances by including a list of mileage figures in the same tariff, by attaching a map to that tariff, or by referring to a separately filed mileage guide compiled by a third part. *See* 49 C.F.R. § 1312.30(c) (1991). If a carrier chooses the third option, the ICC interprets its regulations as obligating the carrier to participate formally in the mileage guides that it incorporates by reference. *See* 49 C.F.R. § 1312.27(e); *Jasper Wyman & Son, et al.—Petition for Declaratory Order—Certain Rates and Practices of Overland Express, Inc.*, 8 I.C.C.2d 246, 251-52 (1992).[2] Formal participation means only that the carrier must pay a nominal fee to the publisher of the mileage guide and have a valid power of attorney on file with the publisher. *See* 49 C.F.R. §§ 1312.10(b), 1312.4(d). The power of attorney allows the publisher to act as the carrier's agent when it files the mileage guide with the Commission.

Overland's tariff referred to Mileage Guide Tariff HGB 100, published by the Household Goods Carriers' Bureau. Although Overland provided the Bureau with a power of attorney in 1970, the shippers claimed that it lapsed in 1983 when Overland failed to pay its nominal participation fee, and the publisher omitted Overland from the list of participating carriers. The

[2] Although Overland challenges this interpretation, we need not consider the validity of the Commission's construction because of our disposition of Overland's other arguments.

shippers contended that the failure to maintain a *valid* power of attorney rendered Overland's filed rates void, and that therefore those tariffs could not serve as the basis for an undercharge suit. Overland's apparent oversight was not unusual. As many as 40% of all carriers failed to satisfy the formal participation requirements for their mileage guides, and shippers have challenged this practice in a number of proceedings. Recognizing the industry-wide importance of the issue, the Commission gave notice in the Federal Register soliciting comments from interested parties. *See* 56 Fed.Reg. 24,091 (1991). After reviewing the public comments and the pleadings concerning Overland in particular, the Commission decided in favor of the shippers. The Commission held that Overland, because its power of attorney had lapsed, failed to participate formally in the mileage guide. *See Jasper Wyman,* 8 I.C.C.2d at 254. The Commission noted that under its regulations, " '[a]bsent effective concurrences or powers of attorney, tariffs are void as a matter of law.' " *Id.* at 250 (quoting 49 C.F.R. § 1312.4(d)). Accordingly, the Commission determined that Overland could not sue for undercharges because there was no effective rate on file that could serve as a basis for a claim. *See id.* at 263. In a subsequent decision, the Commission dismissed the cases referred from the district court on the ground that the declaratory order in *Jasper Wyman* resolved all the pending cases. Overland filed a petition for review of the declaratory order.

II.

Although Overland raises a number of claims, its principle contention is that the Commission's interpretation of 49 C.F.R. § 1312.4(d) resulted in an im-

permissible retroactive rejection of its tariff.[3] In *ICC v. American Trucking Associations*, 467 U.S. 354, 104 S.Ct. 2458, 81 L.Ed.2d 282 (1984), the Supreme Court severely limited the Commission's ability to reject tariff filings retroactively. The Court held that although the Commission could reject tariffs at the time of filing and could cancel the prospective effect of tariffs, it lacked any general authority to invalidate tariffs that it had accepted for filing without objection. *See id.* at 361-64, 104 S.Ct. at 2462-64. Therefore, the Court said that the Commission can reject a tariff retroactively only if that action "further[s] a specific statutory mandate of the Commission," and if the remedy is "directly and closely tied to that mandate." *Id.* at 367, 104 S.Ct. at 2465. Overland contends that the ICC's decision to void

[3] The Commission suggests that petitioner's attack on the validity of 49 C.F.R. § 1312.4(d), promulgated in 1984, violates the Hobbs Act's 60-day limitation on challenges to agency regulations. *See* 28 U.S.C. § 2344. But we generally allow claims, like petitioner's, that a regulation is in excess of statutory authority when raised as a defense to an agency enforcement action. *See NLRB Union v. FLRA*, 834 F.2d 191, 195 (D.C.Cir. 1987). Although here petitioner raised the argument as a defense to the shippers' petition for a declaratory order, we do not think this slight difference in context alters the result. We also allow challenges outside the 60-day time limit when the content of the challenged regulation was unclear prior to its application in a specific case. *See RCA Global Communications, Inc. v. FCC*, 758 F.2d 722, 730 (D.C.Cir. 1985). Although the regulation at issue here did say that a nonconforming tariff would be void as a matter of law, the proceeding below was the first time that the Commission made clear that the regulation would apply retroactively. The Commission's *sua sponte* decision to open the proceeding up for third party comments demonstrates that the regulation's retroactive application was not settled law.

their filed rates years after they became effective is a retroactive tariff rejection that does not directly serve a specific statutory mandate.

The Commission believes that *American Trucking* is inapposite. Its regulation provides that "[a]bsent effective concurrences or powers of attorney, tariffs are void as a matter of law." 49 C.F.R. § 1312.4(d). The Commission explains that if a tariff is void as a matter of law, it never became effective, and because *American Trucking* only limits the Commission's ability to reject *effective* tariffs, it has no need to demonstrate that its remedy directly serves a specific statutory mandate. *Accord Atlantis Express, Inc. v. Associated Wholesale Grocers*, 989 F.2d 281, 283 (8th Cir. 1993).

A careful reading of *American Trucking*, however, reveals that the Commission cannot slip the limitation on its power to reject tariffs retroactively merely by claiming that its regulation never allowed a filed tariff to take effect. Although the Court did refer to limitations on the Commission's power to reject "effective tariffs," it used the phrase "effective tariff" simply to differentiate between the Commission's express statutory authority to reject tariffs prospectively during the application process (*i.e.*, before their *effective* dates), and the limited implicit authority to reject tariffs retroactively once they had gone into effect. *See American Trucking*, 467 U.S. at 360, 104 S.Ct. at 2462 (explaining that, "[o]ur sole concern in this case is whether . . . the Commission has the authority to reject retroactively a tariff . . . once that tariff has *gone into effect*") (emphasis added).[4] That a

[4] The Commission's ability to reject tariffs retroactively only became an issue after 1979 when staff and budget cuts forced the Commission to abandon its policy of scrutinizing every

tariff was effective or in effect is what makes rejection retroactive. A regulation that purports to make a tariff "void" or "ineffective" if a carrier fails to follow a procedural rule, therefore, does not evade *American Trucking's* holding. The Commission is restricted whenever it attempts to invalidate (or alter the past effects of) a tariff after the application period has ended. Otherwise, shippers and carriers could not rely confidently on the rate on file with the Commission, and as explained below, the filed rate doctrine would be undermined. *See id.* at 363 n. 7, 104 S.Ct. at 2464 n. 7. In this case, the ICC did not claim any defect in Overland's filed tariff until years after its effective date.

The Commission argues alternatively that if its remedy properly is considered a retroactive tariff rejection, it still satisfies the two-part test of *American Trucking*. The Commission suggests that when a defect is apparent on the face of the tariffs filed with the Commission, its rule is a straightforward application of the filed rate doctrine incorporated in 49 U.S.C. § 10761(a). *See Freightcor Services, Inc. v. Vitro Packaging, Inc.*, 969 F.2d 1563, 1570 (5th Cir. 1992), *cert. denied*, __ U.S. __, 113 S.Ct. 979, 122 L.E.2d 133 (1993). Here, we are told that a defect was discernible from Overland's filed tariffs. If a shipper had looked up the filed rate, it would have seen that Overland charges a certain rate per mile and that it refers to the Household Goods Carriers' Bureau Mileage Guide

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tariff filing. *See American Trucking*, 467 U.S. at 360 n. 4, 104 S.Ct. at 2462 n. 4. After 1979, the Commission began to review only a fraction of tariffs during the application stage. *American Trucking* establishes that the Commission has greatly reduced remedial authority when a defect is not noticed until after the tariff's effective date.

Tariff HGB 100 to determine the mileage between shipping points. If the shipper then had scrutinized the mileage guide, also a tariff on file with the ICC, it would have noticed that the guide notes on its second page that it applies only to participating carriers listed in a supplement. Turning to that supplement, the shipper would have seen that Overland was not listed as a participating carrier, and accordingly, the shipper would have concluded that Overland had failed to provide a legitimate mileage figure and that therefore its filed rate was incomplete and invalid. The Commission reasons, therefore, that Overland's tariff cannot serve as the basis for an undercharge suit consistent with the filed rate doctrine.

Although acknowledging that most shippers would not have noticed that the mileage guide was valid only for participating carriers, the Commission and intervenors remind us that the filed rate doctrine is an inflexible rule. And just as the filed rate doctrine helped the carriers in *Maislin*, here it shields shippers from undercharge suits—what is sauce for the goose is sauce for the gander. *See Jasper Wyman*, 8 I.C.C.2d at 257. The Commission thus interprets the filed rate doctrine in this proceeding as holding carriers responsible for *any* errors contained in the tariffs filed before the Commission. As long as a shipper can point to a procedural defect evident in the filed tariffs, the rate incorporated in the tariff does not apply.

The Commission's approach, although it may satisfy "poetic justice," does not meet the more straightforward demands of law; it turns the filed rate doctrine on its head. The Supreme Court has long held that a filed rate is valid despite procedural imperfections and even if it reflects a substantive violation of

the ICA. *See Davis v. Portland Seed Co.*, 264 U.S. 403, 425, 44 S.Ct. 380, 385, 68 L.Ed. 762 (1924) ("The statute requires rigid observance of the tariff, without regard to the inherent lawfulness of the rates specified. It commanded adherence to the published rate . . . [and] forbade any other charge.").[5] The Court has justified the doctrine and its often harsh results by explaining that:

> This rigid approach was deemed necessary to prevent carriers from intentionally "misquoting" rates to shippers as a means of offering them rebates or discounts. As the Commission itself found: "[P]ast experience shows that billing clerks and other agents of carriers might easily become experts in the making of errors and mistakes in the quotation of rates to favored shippers, while other shippers, less fortunate in their relations with carriers and whose traffic is less important, would be compelled to pay the higher published rates."

Maislin, 497 U.S. at 127-28, 110 S.Ct. at 2766 (quoting *Poor v. Chicago, B. & Q.R.R.*, 12 I.C.C. 418, 421 (1907)); *see also Louisville & Nashville*, 237 U.S. at 97, 35 S.Ct. at 495.

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[5] Attempting to distinguish *Portland Seed* and other decisions that refused to hold tariffs void despite defects, *see American Trucking*, 467 U.S. at 363 n. 7, 104 S.Ct. at 2464 n. 7, the Commission maintained that the tariffs in those cases "could be considered on file because they at least met the threshold requirement (*i.e.*, they had been sent to the Commission and had not been rejected at the outset)." 8 I.C.C.2d at 259. The same characterization, however, fits Overland's tariff to a tee. Nor do we agree with the Commission that the flaw in Overland's tariff is something more substantial than a "mere[ ] technical[ ] deficien[cy]." *Id.*

The Court's strict enforcement of the filed rate doctrine is, then, an unyielding insistence that the rate on file is the lawful rate. The carriers and the shippers are bound by that which is openly disclosed so as to prevent price discrimination. That purpose is hardly served, indeed it is undermined, by an ICC policy that would make the disclosed rate unreliable unless a shipper took the extraordinary step of determining whether a carrier's tariff filing was defective because its power of attorney was not up to date.[6] The section of the Act on which the filed rate doctrine is based, 49 U.S.C. § 10761(a), does not make every defect in the filed tariff absolutely disqualifying. Rather, it provides that a "carrier may not charge or receive a different compensation for that transportation or service than the *rate* specified in the tariff." 49 U.S.C. § 10761(a) (emphasis added). (It is perhaps for this reason that there is a filed *rate* doctrine rather than a filed *tariff* doctrine.)

As long as the tariff documents "were received and placed on file by the Commission without any objection whatever as to their form and . . . were adequate to give notice" of the rate to be charged, the filed rate doctrine applies. *Berwind-White Coal Mining Co. v. Chicago & Erie R.R.*, 235 U.S. 371, 375, 35 S.Ct. 131,

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[6] The filed rate doctrine and *American Trucking's* general prohibition on retroactive tariff rejections are interrelated—*American Trucking* limits the Commission's authority to disturb the filed rate. *See American Trucking*, 467 U.S. at 363 n. 7, 104 S.Ct. at 2464 n. 7. In effect, the two-part test of *American Trucking* allows the Commission to deviate from the filed rate doctrine only to further a specific statutory mandate. It really makes little sense, therefore, for the Commission to argue, as it does here, that retroactive rejection (that is, deviation from the filed rate) is necessary to promote the filed rate doctrine.

132, 59 L.Ed. 275 (1914); *see also Genstar Chem. Ltd. v. ICC*, 665 F.2d 1304, 1308 (D.C.Cir. 1981), *cert. denied*, 456 U.S. 905, 102 S.Ct. 1750, 72 L.Ed.2d 161 (1982). Here, there is no doubt that Overland's filed tariffs gave shippers adequate notice of its rates. Overland's tariff clearly incorporated the mileage figures from the Household Goods Carriers' Bureau Mileage Guide Tariff HGB 100. It is true that a close inspection of HGB 100 might have raised some uncertainty in a shipper's mind about the propriety of Overland's reference to the Guide, but not any uncertainty over the rate.

The Commission does offer other statutory justifications for its rule. It points out that the Fifth Circuit has suggested that the rule furthers the specific statutory mandate that "[t]he Commission may prescribe other information that motor common carriers shall include in their tariffs." 49 U.S.C. § 10762(a)(1); *see Freightcor*, 969 F.2d at 1570. And the Commission also contends that its rule "ensures that a carrier takes responsibility for establishing its own rates and is not bound by the actions of another unless it has clearly authorized the other to act on its behalf, through a continuing agency relationship."

We rather doubt that § 10762(a)(1)'s permissive authorization for the Commission to require carriers to include other unspecified information is the type of "specific statutory mandate" the Court had in mind in *American Trucking*. And the Commission does not seem authorized to reject tariffs retroactively to satisfy a *regulatory* policy not driven by a specific statutory mandate. Be that as it may, even if ensuring that carriers have valid powers of attorney on file (and guaranteeing that the mileage guide publishers are paid their membership fee) is a permissible statutory

goal, the draconian remedy of retroactive rejection does not seem directly and closely tied to that policy. In approving the retroactive rejection remedy in *American Trucking*, the Court emphasized that other less drastic remedies, like actual damages, were ineffective. *American Trucking*, 467 U.S. at 369, 104 S.Ct. at 2466. Here, by contrast, if shippers or mileage guide publishers were to show that they were injured, damages presumably would be adequate to remedy the injury. *See Genstar*, 665 F.2d at 1308 (explaining that, "where the shipper has been charged no more than the rate reflected in the tariff on file, the remedy for any unlawfulness or irregularity is measured not by looking to some other tariff but by the harm, if any, caused by the unlawfulness or irregularity"). Complete abrogation of the filed rate is only necessary if the Commission's real purpose is to eliminate the trustees' undercharge suits.

Finally, *American Trucking* also stressed the procedural protections that the Commission employed to avoid inequitable results in that context. The Court noted first that tariffs would be rejected only "upon findings of substantial violations." *American Trucking*, 467 U.S. at 370, 104 S.Ct. at 2467. Second, it observed that the nature of the violations were such that "carriers who submit tariffs in substantial violation of agreements will be aware of their transgressions." *Id.* at 371, 104 S.Ct. at 2467. The Court also pointed out that carriers would receive a full hearing subject to judicial review, and that the Commission had the discretion to withhold the sanction. *See id.* at 370-71, 104 S.Ct. at 2467. The petitioner correctly observes that few of these protections are evident in the Commission's decision. Their absence further

supports our conclusion that retroactive rejection is inappropriate.

* * * * *

The Commission's declaratory order constitutes a retroactive tariff rejection in excess of its statutory authority and violates the filed rate doctrine. The petition for review is therefore granted.

APPENDIX B

INTERSTATE COMMERCE COMMISSION

No. 40510

JASPER WYMAN & SON, ET AL.—PETITION FOR DECLARATORY ORDER—CERTAIN RATES AND PRACTICES OF OVERLAND EXPRESS, INC.

Decided January 29, 1992

The Commission finds that because the carrier did not have an effective power of attorney or concurrence with the Household Goods Carrier's Bureau as required by 49 C.F.R. § 1312.4(d), and its participation in Mileage Guide HGB 100 was canceled, the carrier's mileage rates are void as a matter of law and may not form the basis for the undercharges sought by carrier.

INTRODUCTION

BY THE COMMISSION:

By petition filed January 23, 1991, Jasper Wyman & Son, *et al.* (petitioners), seek a declaratory order that the mileage rates sought to be applied by Overland Express, Inc. (Overland or respondent), were void as a matter of law after May 22, 1983, and may not form the basis for the undercharges sought in several underlying court cases.[1] Specifically, peti-

[1] Jasper Wyman & Son and the other petitioners, Codep International, Creamette Co., Lynn Plastics Corporation, Viviano Macaroni, Furniture Crafts, Inc., Fibers & Fabrics of Georgia, Cotter & Company, Distribution Transportation Ser-

tioners contend that respondent was not a participating carrier in the Household Goods Carriers' Bureau Mileage Guide Tariff HGB 100 (HGB Mileage Guide 100), because there was not an effective concurrence or power of attorney as required by 49 C.F.R. § 1312.4(d).

Because the threshold issue in this proceeding is of industry-wide importance, notice of the proceeding

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vice, Inc., Country Oven, Inc., Grinnell Corporation, Purolator, Thompson Consumer, Rudy's Farm Company, S.T. Semicon, General Motors Corporation, Kroger Company, Drexel Company, Alcan Aluminum Corporation, Bear Transportation, BI LO, Inc., Charley Brothers, Warner Lambert, LTD., Zarn, Inc., Anderson Window Corporation, Chase Fitzpatrick, LTD., Davis Distribution, Life Savers, Inc., Witco Corporation, and Greenman Brothers have cases pending before the United States District Court for the Southern District of Indiana, Indianapolis Division in Case No. IP 90-371-C, *Overland Express, Inc. v. Jasper Wyman & Son* and in Case Nos. IP 90-499-C, IP 90-506-C, IP 90-582-C, IP 90-641-C, IP 90-787-C, IP 90-926-C, IP 90-505-C, IP 90-519-C, IP 90-756-C, IP 90-789-C, IP 90-844-C, IP 90-1008-C, IP 90-1147-C, IP 90-1011-C, IP 90-1223-C, IP 90-1234-C, IP 90-365-C, IP 90-444-C, IP 90-468-C, IP 90-473-C, IP 90-490-C, IP 90-643-C, IP 90-645-C, IP 90-692-C, IP 90-743-C, IP 90-764-C, IP 90-822-C, IP 90-898-C, and IP 90-939-C, respectively. This proceeding was initially filed without a court referral.

On May 1, 1991, a petition for declaratory order was filed, pursuant to court referral, in Docket No. 40563, *Jasper Wyman & Son et al.—Petition For Declaratory Order—Certain Rates and Practices of Overland Express, Inc.* The court referral, Case No. IP 90-371-C (referral order signed April 22, 1991), embraced the cases of 14 of the original 30 shippers, as well as the cases of seven additional shippers [L.B. Transport, MSG Arlen Company, Kraft, Inc., MTI Freight Systems, Old Dutch Foods, Inc., Marathon Electric Manufacturing Corporation, and Preferred Products (Case Nos. IP 90-376-C, IP 90-1124-C, IP 90-1233-C, IP 90-1238-C, IP 90-1298-C, IP 90-378-C, IP 90-1142-C, respectively)].

and a request for comments from interested persons was published at 56 Fed. Reg. 24,091 (1991).[2] After reviewing the pleadings and comments, as well as the tariffs at issue, we conclude that after May 22, 1983, there was no effective concurrence or power of attorney as required by 49 C.F.R. § 1312.4(d), and respondent's mileage rate tariff could no longer be applied, and thus may not form the basis for the undercharges sought. Moreover, regardless of whether an effective power of attorney existed, Overland was not permitted to use HGB Mileage Guide 100 to compute rates in its tariffs because, as discussed below, Overland was not shown in Tariff 101-B as being a party to the HGB Mileage Guide 100 series. As a consequence, because Overland's mileage rate tariff had no method to compute mileage, Overland's filed tariffs were incomplete and cannot lawfully support the freight charges sought to be assessed.

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[2] It was determined, in a decision served February 19, 1991, that this proceeding was of industry-wide importance. Respondent subsequently asked that consideration of other cases involving the issue of Overland's mileage rates be delayed. By decision served May 24, 1991, all pending cases involving respondent's use of the mileage rates in issue were held in abeyance. Parties to those cases were invited to participate in this proceeding. Numerous other cases involving Overland's use of the mileage rates have since been filed and held in abeyance.

Comments were filed by Gulf States Paper Corporation; Thomas J. Lipton, Inc.; Flexel, Inc.; The Kroger Company; Scopelitis, Gravin, Light & Hanson, P.C.; National Motor Freight Traffic Association, Inc.; The Household Goods Carriers' Bureau, Inc.; and Roberts & Dybahl, Inc.

DISCUSSION AND CONCLUSIONS

The mileage rates Overland seeks to apply were published in Overland Tariff ICC OVLA 200 series and 202 series. A mileage rate consists of two parts: (1) the rate per mile; and (2) the distance between the origin and destination to be multiplied by the rate per mile. 49 C.F.R. § 1312.30. Under 49 C.F.R. § 1312.30(c), carriers have three alternative methods of establishing distances: (i) publishing the distances between all locations covered by the distance rates in the same tariff; (ii) referring to a map(s) attached to the same tariff; or (iii) referring to a separately filed distance guide tariff. (49 C.F.R. § 1312.30(c)(4))

Overland chose the third method to prescribe the distances to be used for its mileage rates. Item 25 (entitled "governing publications") of Overland's tariffs OVLA 200-A (Tariff 200-A), 202 (Tariff 202), and 202-A (Tariff 202-A) (collectively Tariff 200) specifically states that the tariff is governed, except as otherwise provided, by HGB Mileage Guide 100, issued by Household Goods Carriers' Bureau (HGCB), Agent ICC HGB-100-A (Tariff 100-A) and 100-B (Tariff 100-B) (collectively, Tariff 100).[3] Thus, freight charges cannot be calculated from Tariff 200 without using Tariff 100.

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[3] Overland's Tariffs 200-A, issued February 19, 1986, and December 15, 1987, respectively, and 202-A, issued September 8, 1986, list Tariff 100-B as the governing publication. Overland's Tariffs 202, issued August 5, 1983, and January 25, 1985, respectively, list Tariff 100-A as the governing publication.

Tariffs 202 and 202-A state that they are also governed by Household Goods Carriers' Bureau, Agent Zip Code Guide ICC HGB-105 (HGB Tariff 105), but all references to Tariff 105 are prefixed with circle reference 1, which is explained as: "Applies only when specific reference is made hereto."

The Commission's regulations require, as relevant here, that carriers participating in tariffs that refer to, and are governed by, separate tariffs (classifications, exceptions, rules, etc.) must also participate in those governing separate tariffs. 49 C.F.R. § 1312.27(e). A carrier participates in a tariff filed by another carrier or an agent by issuing a concurrence or power of attorney.[4] 49 C.F.R. § 1312.10(b), 1312.4(d). The regulations state that absent effective concurrences or powers of attorney, tariffs are void as a matter of law. 49 C.F.R. § 1312.4(d).

With one exception not relevant here,[5] carriers must use only distance guides that are officially on file with the Commission. 49 C.F.R. § 1312.30(c)(4).[6] Petitioners contend that Overland did not participate in the mileage guide because it had neither an effective power of attorney nor a concurrence in the guide, and that its tariffs are, therefore, void as a matter of law. Overland contends, on the other hand, that Supreme Court precedent prohibits the voiding of tariffs that are already on file, that the Commission's rules do not require concurrences or powers of attorney for distance guides, and that even if concurrences or

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[4] "Concurrence" is the term generally used when one carrier agrees to participate with another carrier in a joint movement under a joint rate schedule. "Power of attorney" is the appropriate means to signify the willingness to participate in an agent's tariff, and is the relevant term here.

[5] As provided in 49 C.F.R. § 1312.30(c)(4) and § 1312.13(e)(2), distance guides which are published as a standard by the Federal government in the C.F.R. or other publications do not have to be filed.

[6] In other words, mileage guides are a form of tariff: a tariff is defined as a publication containing rates, classification ratings, rules, regulations, or other provisions, as amended, filed in a carrier's or agent's name. 49 C.F.R. § 1312.1(b)(35).

powers of attorneys are required, Overland complied with those requirements.

We will address each of Overland's contentions below.

I. *Do the Commission's regulations require participation in mileage guides?*

Overland argues that the tariff voiding provisions of 49 C.F.R. § 1312.4(d) do not apply to mileage guides because "[n]either statute nor ICC regulation mandates that a carrier issue a power of attorney to *refer* to a distance guide, which is not even a 'tariff'." (Respondent's statement of Facts and Argument, Part 1, p. 23) As § 1312.30(c)(1)(iii) states, a carrier that files a tariff containing distance rates must refer "to a distance guide(s)." Section 1312.30(c)(2), only distance guides *officially on file* with the Commission may be referred to." (Emphasis added) And, as noted above, § 1312.4(d) sets forth the following requirements for a carrier wishing to participate in the mileage guide or tariff of another carrier or agent:

> * * * a carrier may not participate in a tariff issued in the name of another carrier or agent unless a power of attorney or concurrence has been executed. Absent effective concurrences or powers of attorney, tariffs are void as a matter of law * * *.

Overland contends that because § 1312.30(c) specifies only that carriers must "refer" to distance guides, carriers do not have to "participate" in guides in order to have a valid tariff. In support of this, Overland notes that when the Commission revised its

tariff regulations now codified at Part 1312 in 1984,[7] it removed language that explicitly required participation in distance guides. Section 1310.16 of the previous regulations required that carriers referring to distance guides be parties to each such guide:

> (e) *When a distance guide is referred to.*
>
> (1) Only distance guides officially on file with the Commission may be referred to. More than one may be referred to provided the rate tariff clearly specifies the circumstances under which each guide will apply. *All carriers parties to distance rates referring to one or more distance guides must also be parties to each guide referred to.* An agent may refer to a distance guide published in the name of another agent for the account of participating carriers also parties to the guide. (underlining added for emphasis)

The proposed rules issued in 1983, contained virtually identical language requiring carriers to be parties to the distance guides they used.[8] That language, however, was deleted from the final rules. *Regulations* at 471. The only explanation given for the deletion was the following (*Id.* at 425):

> § 1312.31[9] *Distance Rates*
>
> No comments were received regarding this section and the adopted rule is substantially the same as that shown in our proposed rules. Due to

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[7] *Revisions of Tariff Regulations, All Carriers,* 1 I.C.C.2d 404 (1984), (*Regulations*).

[8] *See* Docket No. 37321, *Revision of Tariff Regulations, All Carriers* (not printed), served July 7, 1983, at 92.

[9] The final rules changed the number of the distance rates section from § 1312.31 to § 1312.30.

> issues of copyright and general availability, we will not mandate, for distance guides, who must be parties or I.C.C. filing of the publication.

Overland contends that the deletion and the explanation given for the deletion (that the Commission "will not mandate, for distance guides, who must be parties") demonstrate that participation in distance guides is not required.

Finally, Overland argues that the deletion is consistent with the Commission's decision in Docket No. 38886, *Pet. for Intervention and Reconsid. of Special Tariff Auth. No. 82-1827 and Pet. for Decl. Order Concerning the Lawfulness of Copyrighted Tariffs* (not printed), served March 2, 1983, (*Special Tariff Auth.*). In that case, the petitioner, a company engaged in the business of developing computer software and data bases for the motor carrier industry, requested in essence that the Commission refuse to accept any tariff for which the filer claimed any rights under copyright law.[10] The Commission refused to do so, stating that "the issue of copyright infringement lies within the exclusive jurisdiction of the courts." Overland avers that by the refusal, the Commission made a conscious decision not to get involved in the copyright issue, and, recognizing that distance guides contain copyrighted material, eliminated the need

[10] Specifically, petitioner requested that the Commission (1) refrain from accepting tariff publications bearing notice of copyright; (2) require the tariff filer to verify that a claim of copyright will not be made with respect to the tariff filing; (3) require the tariff filer to declare that no action would be taken to enforce a claim of copyright; and (4) require the Household Goods Carriers' Bureau to sell computer tapes of its mileage guide to any person. Slip op. at 1.

and requirement that carriers be participants in the guides.

Overland's analysis is faulty. First, except for government publications,[11] distance guides must be filed, *i.e.*, distance guides are tariffs. 49 C.F.R. § 1312.30 (c)(4). Carriers using distance guides must therefore follow the normal tariff filing rules regardless of whether the rules are repeated in the regulations specifically applicable to distance guides. Under the normal rules, a carrier participating in tariffs which refer to other tariffs must also participate in those tariffs. 49 C.F.R. § 1312.27(e). A carrier may not participate in another carrier's filed tariff unless a power of attorney or concurrence has been executed. 49 C.F.R. § 1312.4(d).

The fact that the Commission removed language in the distance guide regulations which specifically required carriers to be parties to distance guides is irrelevant since the language was redundant in the first place. Moreover, the deletion of the language regarding carriers being parties to distance guides, was necessary to allow for the exception for government publications. Otherwise carriers could not use government publications, since there is no mechanism by which carriers can be "party to" unfiled government publications. If the Commission had intended to remove participation requirements for distance guides, it would have had to write in a specific exception to the general rules.

The Commission's statement in *Regulations*, that because of copyright and availability issues it would "not mandate, for distance guides, who must be par-

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[11] *See* 49 C.F.R. § 1312.13(e)(2).

ties or I.C.C. filing of the publication" is not addressed to this issue. The Commission meant simply that because of the pending copyright litigation, involving the right to author a mileage guide, it would not preclude any author from filing a mileage guide with the Commission, nor deny any carrier's right to participate in any filed mileage guide of choice still required compliance with power-of-attorney and participation regulations.

Finally, there is no inconsistency between *Special Tariff Auth.* and requiring participation in distance guides. The Commission noted in that decision that "[c]opyrighted tariffs are being published and filed, kept open, and made accessible to the public consistent with the Act and our regulations, including those relating to the transmission of publications to subscribers." Slip op. at 6-7. In short, there was no reason for the Commission to make distance guides an exception to the normal tariff filing and participation rules, because regardless of the copyright litigation, copyrighted tariffs were available for use by the public.[12]

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[12] Overland claims that its interpretation is consistent with the Commission's stated desire for rules that "are flexible enough to encourage carriers to * * * be innovative and competitive in designing tariffs * * *," *Regulations* at 405, and with the instruction in 49 C.F.R. § 1312.1(c)(3) that the regulations "are to be liberally construed." Overland contends that petitioners' interpretation of the regulations is so narrow "as to produce a result that is harsher and more draconian than could have been obtainable under the prior regulations * * *." (Respondent's Statement of Facts and Argument, Part 1 p. 16)

Since the new regulations have the same result as the old, they are not "harsher and more draconian." Moreover, even if carriers are "innovative and competitive" in their tariffs, the tariffs must still be filed. As discussed further *infra*, tariffs lacking concurrences or powers of attorney are not effectively filed.

II. *Did Overland participate in a mileage guide?* As discussed below, we find that Overland did not participate in HGB Mileage Guide 100. First, there was no effective power of attorney to permit Overland's participation. Second, Overland was not listed as a participant in the tariff. We also find that Overland's tariffs did not permit the use of an alternate mileage guide to develop charges under the rates at issue.

(a) *Power of Attorney.* At issue here is whether an effective concurrence of power of attorney for Overland existed after May 22, 1983. Overland contends that it properly executed a power of attorney and that, at all times at issue in this proceeding, it had on file with the Household Carrier's Bureau an effective power of attorney that allowed participation in both the HGCB's Mileage Guide 100 and Zip Code Guide 105. Petitioners, however, provide persuasive evidence that Overland participated in the Household Goods Carriers' Bureau Mileage Guide only from 1970 until May 22, 1983,[13] when Overland's participation was canceled[14] for nonpayment of the participation fee for the preceding year.[15] The Household Goods

[13] Comments of the Household Goods Carriers' Bureau, p. 5.

[14] Household Goods Carriers' Bureau Agent Tariff ICC HGB No. 101-A, Supplement No. 72, issued March 23, 1983, and effective April 22, 1983, titled "participating carrier and scope tariff," lists Overland at p. 13 with the sign "+" next to its name. Page 2 of the tariff explains that "+" means the carrier's participation would be canceled effective May 22, 1983.

[15] Letter dated June 21, 1990, to Mr. Martin Weissert, from F.L. Wyche, an employee of Household Goods Carrier's Bureau, explaining that it was the policy of the bureau to bill carriers at the beginning of the yearly participation period and if payment was not received by the end of the year, cancellation was arranged 60 days from the date the supplement was issued. (*See* Appendix F to Petition for Declaratory Order.)

Carriers' Bureau considers the relevant power of attorney "dead" if a carrier fails to renew it (by submitting the participation fees) within a reasonable time after cancellation.[16]

Overland argues that the cancellation should not be binding on it because it never received any notice of cancellation and first learned of the cancellation after it ceased operating in August 1988.[17] In response, petitioners contend that Overland is charged with constructive notice of the HGCB's tariff filing that specifically canceled Overland from its Tariff 101-A effective May 22, 1983. Petitioners note that Overland is charged with knowledge of the terms of the power of attorney it signed in 1970, binding it to the actions of its agent.

Moreover, the Household Goods Carriers' Bureau's general policy is to forward to carriers a number of letters and invoices advising them of their delinquency and of the pending cancellation action as well as a copy of the issued cancellation supplement.[18] There is no evidence to suggest that this normal business practice was not followed here.

Overland chose Household Goods Carrier's [*sic*] Bureau as its agent and is bound by the actions of its agent. The Commission's warning to carriers about the consequences of being canceled by an agent from its participating tariff for failing to pay the estab-

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[16] Respondent's Statement of Facts and Argument, Part I, Exhibit C, p. 14.

[17] Respondent's Statement of Facts and Argument, Part II, Affidavits of Terrell Wagner (paragraphs 15, 16, and 17) and Gregory Cernjar (paragraphs 21 and 23).

[18] Respondent's Statement of Facts and Argument, Part I, Exhibit C. p. 12-13.

lished dues of such publishing agent is not new. *See* General Order dated October 30, 1939, *Cancellation of Participation in Agency Tariffs.* Due to the negligence of Overland or its agent, Overland's participation in Tariff 101-A tariff was effectively canceled.[19] More importantly, respondent, as well as the general public, was put on constructive notice of Overland's cancellation by the March 23, 1983, issuance of ICC HGB 101-A Supplement No. 72.

Existence of an alternative power of attorney. Respondent contends that a separate power of attorney to appoint the Household Goods Carriers' Bureau as its agent, filed November 9, 1984, authorized Overland to use both the Mileage Guide and the Zip Code Guide.[20] However, this second power of attorney was marked "zip only" by an agent of Household Goods Carriers' Bureau, and the publication of Overland's participation was limited to the Zip Code Guide.[21] This suggests that Overland intended for this second

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[19] It is well settled that negligence on the part of a carrier's management is not a defense to the requirement that a carrier have its rates on file with the Commission. *Maislin Industries U.S. Inc. v. Primary Steel, Inc.*, 110 S.Ct. 2759, 2767 (1990, (*Maislin*).

[20] Respondent's Statement of Facts and Argument, Part 1, p. 6-7.

[21] Household Goods Carriers' Bureau Tariff, ICC HGB 101-B, Supplement No. 13, issued December 18, 1984, and effective January 17, 1985, titled "participating carrier and scope tariff" lists Overland at 7 with the signs @ and (Z) next to its name. At 2 of the Tariff explains that the @ indicates Overland's participation was effective December 28, 1984, and the (Z) indicates Overland's participation was limited to the HGCB's Zip Code Guide.

power of attorney to apply only to the Zip Code Guide.[22] But in any event, Overland is bound by the actions of its agent, which limited its publication of Overland's participation to the Zip Code Guide.

(b) *Lack of listing as participant in mileage guide tariff.* The Household Goods Carriers' Bureau files a separate tariff that specifically names the carriers participating in its Mileage Guide 100. In turn, the HGB Mileage Guide 100 specifically prohibits a carrier from referring to the guide unless that carrier is listed as a participant.[23] On March 23, 1983, Household Goods Carrier's Bureau issued Supplement 72 to its Tariff No. 101-A canceling Overland's participation in its Mileage Guide 100 series effective on May 22, 1983, for non-payment of the required annual participation fee. The record clearly shows that, during the period covered by the subject proceeding,

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[22] Mr. Harrison states that Household Goods Carriers' Bureau personnel would not have limited the power of attorney to its Zip Code Guide without specific instructions from the carrier. (Respondent's Statement of Facts and Argument, Part 1, Exhibit C, p. 25).

[23] HGB Mileage Guide 100-B, at 2, states the following:

PARTICIPATING CARRIERS

For list of participating carriers refer to "Participating Carrier and Scope Tariff No. 101-B, ICC HGB 101-B, Household Goods Carrier's Bureau, Agent, Supplements Thereto or Reissues Thereof." NOTE: This mileage guide may not be employed by a carrier as a governing publication for the purpose of determining interstate transportation rates based on mileage or distance, unless carrier is shown as a participant in the above named tariff.

If a carrier is not listed as a participant, it may not use the Mileage Guide, even if the carrier had given its agent a power of attorney to effect that participation.

Overland was not shown in Tariff 101-B as being a party to the Mileage Guide 100 series. Consequently, Overland was not permitted to use this guide to compute rates in any of its tariffs. Inasmuch as Overland's Tariff 200 series depended entirely on HGB Mileage Guide 100 for its mileage rates (no other method is supplied in that publication for computing mileage) and Overland may not use that mileage guide, freight charges cannot be computed under the mileage rates named in Overland Tariff 200.

(c) *Use of Zip Code Guide.* Overland contends that, if we find its participation in HGB Mileage Guide 100 to be void, the mileage contained in the Zip Code Guide 105 should apply for all of the mileage or distance rates contained in Overland's tariffs. In response, petitioners argue that the Zip Code Guide cannot be used because Overland's mileage rates have a specific tariff limitation, *i.e.*, that the Zip Code Guide applies only when specific reference is made to the guide. Respondent suggests that the limitation was intended only to create a rule of precedence, so that only one guide would apply for each item and to comply with 49 C.F.R. § 1312.30(c)(4). (As respondent notes, the Commission has long held that the use of two mileage guides to govern distance rates creates an inherent conflict that requires publishing a precedence of rate rule.)

In support of its position, respondent cites *Informal Opinion of Lawrence C. Herzig, Section of Rates and Informal Cases,* RCG-19845-88.[24] As petitioners correctly point out, however, the informal opinion of

[24] Respondent's Statement of Facts and Argument, Part 2, Exhibit 2.

Mr. Herzig was limited to the situation where the carrier referred to both guides without limiting the application of either guide. Thus, it is inapplicable to Overland's tariffs, which had a specific restriction of HGB Tariff 105 to rates that make specific reference to the Zip Code Guide.

Respondent further contends that applying the Zip Code Guide would be consistent with the intent of the framers of the tariff and with Commission and judicial precedent. Overland cites No. 40417, *D.W. Davies & Co., Inc. v. Express Freight Lines, Inc.* (not printed), served May 17, 1991, (*Davies*) where we noted that it is a well-settled principle of tariff interpretation that the intention of the framers of the tariff is to be considered. However, this rule is used only to resolve ambiguity in a tariff that is duly filed. Here, by contrast, Overland's tariff was not effectively on file.

III. *Does the Commission have the authority to deem Overland's tariffs void?*

In related arguments, Overland contends that the Commission lacks the authority to disregard Overland's tariffs. Overland aruges that (a) the Commission may not abrogate its statutory responsibility to ensure that carriers file their tariffs (and their powers of attorney and concurrences) by simply voiding rates; (b) the Commission may not reject effective tariffs retroactively; and (c) even if the Commission may void references to the mileage guide, Overland's tariffs substantially comply with the regulations and must be enforced.

(a) *Abrogation of statutory responsibility.* Overland suggests that the tariff voiding provision of 49 C.F.R. § 1312.4(d) results in an abrogation of the

Commission's statutory responsibility to ensure that carriers file their tariffs, exceeds the Commission's authority to promulgate tariff regulations under 49 U.S.C. § 10762(b), and imposes an overly harsh penalty upon the carriers.

Overland cites no case law or other support for its proposition that the Commission has abrogated its statutory responsibilities, and we reject the argument. As for the harshness of the consequences, the Supreme Court has reaffirmed in *Maislin* that all tariff users (shippers and carriers alike) are responsible for knowing the terms of the tariffs on file with the Commission. If shippers can be expected to know the rate that is on file, regardless of the complexities of the modern tariff system, and regardless of fraud, mistake, or misrepresentation on the part of the carrier, then surely the carriers, which are responsible for filing their tariffs, can also.

(b) *Retroactive rejection of effective rates.* Citing *Interstate Commerce Commission v. American Trucking Associations, Inc.*, 467 U.S. 354 (1984), (*American*), Overland claims that 49 C.F.R. § 1312.4(d) cannot be used retroactively to reject effective tariffs. In that case, the Supreme Court held that 49 U.S.C. § 10762(e), which authorizes the Commission to reject motor carrier tariffs if they violate statutory or regulatory requirements, does not confer upon the Commission the power to nullify effective tariffs retroactively.

Overland contends that its tariffs were "effective" because they were filed with the Commission and not rejected by the Commission prior to their effective

dates and had thereby "gone into effect".[25] Overland seeks to align itself with those cases where a tariff, even though submitted in a technically deficient manner, has been treated as the applicable tariff once it has been accepted by the Commission, and any recovery by the shipper based upon the deficiency is limited to actual damages.[26]

Petitioners argue in response that no retroactive rejection of an effective tariff is involved here because Overland had no "effective" tariff on file. Overland's distance portion of its mileage tariff was not on file because Overland did not have a current power of attorney or concurrence in the distance guide.

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[25] Overland cites to the following discussion in *American*, at 360, footnote 4:

> Prior to 1979, the Commission had no need to reject *effective* tariffs, because the Commission's staff examined every filing prior to the *effective date* of the proposed tariff and, if an obvious defect was discovered, the tariff was rejected immediately. In 1979, however, budgetary cutbacks forced the Commission to abandon its comprehensive examination program. Since then, the Commission has reviewed only a random sampling of tariff filings, and tariffs with obvious defects inevitably are *permitted to go into effect.* [emphasis added by Overland]

[26] *See American* at 364, footnote 7:

> Indeed, until the recent past, the Commission generally shared the view that, though a tariff might have been submitted in a technically deficient manner, the tariff was not a nullity and a shipper's recovery was limited to actual damages. *See Boren-Stewart Co. v. Atchison, T. & S.F.R. Co,* 196 I.C.C. 120 (1933); see also *Acme Peat Products, Ltd. v. Akron, C. & Y.R. Co.*, 277 I.C.C. 641, 644 (1950) ("Where tariffs are tendered to and accepted by the Commission, the rates therein become applicable, even though technically they should have been rejected upon tender.")

Thus, there is no retroactive rejection here; rather, as of May 23, 1983, Overland's mileage rate tariffs were void under our regulations and could no longer be applied because they failed to provide the means for determining the freight charges to be assessed and collected. At that time, the tariffs ceased to satisfy the fundamental purpose of tariffs; to disclose the freight charges due to the carrier.

Petitioners note that *American does* permit the Commission to reject tariffs retroactively, pursuant to the agency's general remedial powers, when the remedy "further[s] a specific statutory mandate of the Commission", and the remedy is "directly and closely tied to that mandate". *American* at 367. Petitioners argue that even if Overland's tariff was "effective," rejection is necessary and justified under the agency's general remedial powers. Since we find that Overland's mileage tariff was inherently defective, we do not have to reach this argument.

We agree with petitioners that Overland did not have an effective tariff on file. In order to have an effective mileage rate on file, a carrier must publish both the rate per mile and the number of miles. Overland had the former on file, but not the latter as of May 23, 1983. Overland could have corrected this omission by including the distances or maps in the tariff which Overland itself submitted to the Commission. Alternatively, Overland could have adopted the mileages in some other tariff by participating in that other tariff by executing a concurrence or power of attorney as required by 49 C.F.R. § 1312.5(d). Overland did neither and therefore failed to have an effective distance tariff on file.

The cases Overland cites are not persuasive otherwise. The tariff in *American* was admittedly effec-

tive. The issue addressed was whether the Commission could retroactively reject a tariff which has gone into effect, but which ultimately was determined to have substantive flaws.[27] Unlike the issue addressed in the instant proceeding, the court did not have to decide whether the tariff at issue had been *effectively* on file.

Similarly, the language cited from footnotes 4 and 7 in *American* refers to cases involving tariffs which, though technically deficient, were tariffs on file. These tariffs, although not complying with all of the tariff regulations, could be considered on file because they had at least met the threshold requirement (*i.e.*, they had been sent to the Commission and had not been rejected at the outset). In such cases, the Commission has frequently found, as Overland and *American* indicate, that the tariffs were applicable regardless of the technical deficiencies.[28]

Here, however, Overland's tariff did not meet even the threshold requirement. Overland sent no distance tariff to the Commission itself, nor in lieu of that did it participate in the distance guides filed by another carrier or agent. Nor did the mileage guide

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[27] The substantive violation involved was lack of compliance with the rules governing rate bureau actions.

[28] *See, e.g., Acme Peat, supra* (tariff applicable although it contained a rate higher than that permitted as a maximum reasonable rate under an outstanding Commission order); *Atlantic Commission Co., Inc. v. Bangor & A.R. Co.*, 266 I.C.C. 651 (1946) (tariff applicable although it did not contain the required symbol indicating a rate change); *Heavy and Spec. Carriers Tariff Bur. v. U.S.A.C. Transport*, 302 I.C.C. 487 (1957) (tariff applicable although symbol had been omitted); *Genstar Chemical, Ltd. v. I.C.C.*, 665 F.2d 1304, 1308 (D.C. Cir. 1981) (collecting cases).

list Overland as a participating carrier. Consequently, Overland's tariffs were not merely "technically deficient", but, rather, lacked effective provisions necessary to calculate freight charges.

Maislin made it very clear that tariffs must be on file before their rates can be applied. Moreover, the Commission rules have long stated that a carrier participates in ("files") the rates of another carrier only through the concurrence or power of attorney process. This requirement is significant enough that since 1984, the Commission's regulations have reminded carriers that absent concurrences or powers of attorney, their tariffs are void as a matter of law. This was a simple requirement for Overland to comply with; Overland did not, and under *Maislin*, the rates sought by Overland may not be applied.

(c) *Substantial compliance.* In a similar argument, Overland contends that its tariffs substantially comply with the Commission's tariff requirements and should be considered fully enforceable. Overland cites two cases in which the Supreme Court held that the illegality of a filed tariff did not void its application and that the statute requires rigid observation of the tariff without regard to the inherent lawfulness of the rates specified.[29]

In *Portland*, a case in which the shipper challenged collection of a filed rate that violated the long and short-haul statute, the Court held that "[t]he statute requires rigid observation of the tariff without regard to the inherent lawfulness of the rates specified * * *."

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[29] *See Davis v. Portland Seed Co.*, 264 U.S. 403, 404 (1924), (*Portland*) and *Berwind-White Coal Mining Co. v. Chicago and Erie Railroad Co.*, 235 U.S. 371 (1914) (*Berwind*).

Similarly, respondent notes that the Supreme Court in *Berwind* stated that:

> the contention [non-compliance with tariff regulations] is without merit. The documents were received and placed on file by the Commission without any objection whatever as to their form and it is certain that, as a matter of fact, they were adequqate to give notice.

Berwind, at 375.

Overland notes that its mileage rates likewise were placed on file at the Commission without any objection (to their reference to HGB Tariff 100 as a governing publication) for more than six years after filing.

As with the cases discussed earlier, these cases involved tariffs that were effectively on file, but that either suffered from irregularities violating the Commission's tariff regulations or contained rates that substantively violated the Interstate Commerce Act. As we have stated, Overland's tariff was not effectively on file as of May 24, 1983.

Overland also suggests that HGB Tariff 100 is adequate to give notice of the applicable mileage, because the tariff is itself a filed publication. Overland further suggests that, even if reference to HGB Mileage Guide 100 is void, at worst the term "miles" as contained in Overland's tariff becomes ambiguous, and the shipper would be entitled to any reasonable determination of mileage. The arguments that HGB Tariff 100 is adequate notice of the applicable mileage and that a distance ambiguity is acceptable are merely attempts to avoid the filed rate doctrine, which charges carriers and shippers with knowledge of the applicable tariffs and the Commission's statute and

regulations. To have an effective mileage rate, *both* the rate per mile and the number of miles must be on file; otherwise carriers could discriminate among shippers by assigning preferred shippers lower mileages. HGB Mileage Guide 100 must be applied as filed, and it did not list Overland as a participiating carrier after May 22, 1983. Yet Overland's Tariff 200 series continued to refer specifically to the HGB Mileage Guide 100 and provided no other acceptable means to calculate mileage.

IV. *Other issues.*

(a) *Failure to reject other void tariffs.* Overland contends that it should be allowed to apply its mileage rates because the Commission has condoned, if not encouraged, the filing of distance rates that violate 49 C.F.R. § 1312.30(c), but not rejecting numerous mileage rates where the carriers did not have an effective power of attorney on file with the Household Goods Carrier's Bureau.[30] Respondent contends that since 1984, when 49 C.F.R. § 1312.4(d) became effective, no tariff has been rejected by the Commission on this basis.[31] It, therefore, erroneously infers that the

[30] Overland indicates that it obtained this information from the Commission's response to Overland's Freedom of Information Act (FOIA) request.

[31] Overland notes that in response to its FOIA request, the Commission produced several Office of Compliance and Consumer Assistance (OCCA) files that reveal nonparticipating carriers that have tariffs referring to HGB Mileage Guide 100 to determine distance. Overland contends that in most of these cases the carriers would have to impose significantly higher class rates in lieu of rates based on mileage, but the Commission's files fail to reveal that any action was taken against these

regulations do not require participation in distance guides and that the voiding provision of 49 C.F.R. § 1312.4(d) does not apply to the use of distance guides.

Respondent charges that to now enforce the tariff participation requirement in this manner is an improper effort to relieve shippers from undercharge claims filed by bankrupt carriers. Overland asserts that there is an agency bias against bankrupt carriers' collection efforts. It points to a memorandum to the Chairman of the Commission from the Commission's General Counsel, in which one of the factors that the General Counsel cited as favoring Commission action in these cases was that:

> [T]he cases seem to involve the same equities as the negotiated rates cases; *i.e.*, bankrupt carriers (and their auditors) attempting to collect, after the fact, charges that are significantly higher than those the shippers and carriers expected at the time of shipment.

We reject respondent's characterizations. That other carriers may also have tariffs on file that violate 49 C.F.R. § 1312.4(d) has no bearing on the validity of respondent's tariffs. The Commission has neither condoned nor encouraged violation of its tariff regulations governing publishing mileage or distance rates. Rather, we rely in great part on the affected parties to bring to our attention issues of reasonableness, invalidity, or irregularity in tariffs submitted. Moreover, in this proceeding we hope to be able to resolve

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carriers. Overland states that apparently the Commission allowed these carriers to continue to charge their lower "void mileage" rates without corrective action.

the larger issue of carriers' failure to participate in mileage guides and other tariffs. In that light, we have already noted that this proceeding is of industry-wide importance.

We specifically reject respondent's suggestion that we are seeking to implement our failed negotiated rates policy, invalidated by the Supreme Court's holding in *Maislin*, in another guise. Instead, we are following that decision by applying the filed rate doctrine evenly to carriers and shippers alike. The filed rate doctrine prohibits the equitable considerations espoused by respondent.

(b) *Equitable arguments.* Overland states that the relief requested by petitioners of voiding mileage rates for failure properly to participate in a distance guide would lead to chaos and result in hundreds of millions of dollars of tariff overcharges and undercharges. Overland contends that finding that these tariffs are void would destroy the present rate structure of carriers who have relied upon the Commission's acceptance of their tariffs as a determination that they were properly filed.

These equitable arguments are not persuasive. This case is before us because the rates that were quoted, billed, and paid in full were not properly filed with the Commission. The rates Overland has offered in their stead, however, also were not properly on file at the Commissino. It would violate the filed rate doctrine to allow respondent to collect undercharges based on these rates. The filed rate doctrine requires strict adherence to tariff filing requirements regardless of how many businesses adversely are affected and without regard to the equities of the situation.

(c) *Other arguments.* Finally, Overland claims that a published tariff is analogous to a contract that is to be interpreted by a court pursuant to the terms and conditions contained in the tariff. Respondent contends that court precedent supports reforming its tariffs, by eliminating the restriction to the use of HGB Tariff 105 in the event HGB Tariff 100 is found to be void. However, there can be no effective "contract" to be interpreted and applied, since Overland did not have an effective tariff on file with the Commission.

In conclusion, we find that, because Overland did not have an effective power of attorney or concurrence with the Household Goods Carrier's Bureau as required by 49 C.F.R. § 1312.4(d), and its participation was canceled, effective May 22, 1983, the mileage rate tariffs of Overland Express, Inc. failed to provide the means for calculating freight charges, and may not serve as the basis for the undercharges sought by respondent.[32]

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[32] Overland suggests that if the Commission voids its use of distance rates after May 22, 1983, the rates in effect prior to the cancellation would govern. Respondent argues that its undercharge bills would not be void, but instead would have to be rerated, based on its effective 1983 tariffs.

Petitioners respond that in the absence of an effective tariff, the Commission, pursuant to 49 U.S.C. § 10704(b) ("When the Commission decides that a rate charged or collected * * * does or will violate this chapter, the Commission shall prescribe the rate (including a maximum or minimum rate * * *)"), has a duty to prescribe reasonable rates. Petitioners have urged that the Commission prescribe the agreed-upon rates as the reasonable rates under the circumstances. Additionally, petitioners note that, even if higher rates result from the Commission's rejection of the involved tariffs, shippers may have other evidence and defenses to counter respondent's undercharge claims.

Inasmuch as both the petition for declaratory order filed January 23, 1991, and respondent's letter dated May 3, 1991,

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is discontinued.

2. A copy of this decision will be mailed to the parties of record.

3. This decision is effective on January 30, 1992.

By the Commission, Chairman Philbin, Vice Chairman McDonald, Commissioners Simmons, Emmett, and Phillips.

(SEAL)

Sidney L. Strickland, Jr.
Secretary

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requested only a determination of the threshold issue of whether the mileage rates were void after May 22, 1983, we need not reach these issues. Nevertheless, in our decision in No. 40387, *Wonderoast, Inc.—Petition for Declaratory Order—Certain Rates and Practices of TSI, Inc.* (not printed), served June 5, 1991, involving a carrier that was not listed as a participating carrier in a governing tariff (for failure to file a concurrence or power of attorney), we indicated that if a carrier had no lawful rates on file, it has no basis for collecting undercharges based on the filed rate doctrine.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 92-1037

OVERLAND EXPRESS, INC., PETITIONER

v.

INTERSTATE COMMERCE COMMISSION, RESPONDENT

[Filed Sept. 22, 1993]

Before EDWARDS and SILBERMAN, Circuit Judges.

ORDER

Upon consideration of respondents' petition for rehearing, filed August 6, 1993, and of the responses thereto, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, Clerk

By: ROBERT A. BONNER
Robert A. Bonner
Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 92-1037

OVERLAND EXPRESS, INC., PETITIONER

v.

INTERSTATE COMMERCE COMMISSION, RESPONDENT

[Filed Sept. 22, 1993]

Before MIKVA, Chief Judge; WALD, EDWARDS, SILBERMAN, BUCKLEY, WILLIAMS, D. H. GINSBURG, SENTELLE, HENDERSON, and RANDOLPH, Circuit Judges.

ORDER

Respondents' Suggestion For Rehearing *En Banc* and the responses thereto have been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the petition is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, Clerk

By: ROBERT A. BONNER
Robert A. Bonner
Deputy Clerk

APPENDIX E

49 U.S.C. § 10761

§ 10761. Transportation prohibited without tariff

(a) Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title [49 U.S.C.S. § 10501 *et seq.*] shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter [49 U.S.C.S. § 10761 *et seq.*]. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

(b) The Commission may grant relief from subsection (a) of this section to contract carriers when relief is consistent with the public interest and the transportation policy of section 10101 of this title [49 U.S.C.S. § 10101]. The Commission may begin a proceeding under this subsection on application of a contract carrier or group of contract carriers and on its own initiative for a water contract carrier or group of water contract carriers.

* * * * *

(Pub. L. 95-473, Oct. 17, 1978, 92 Stat. 1394.)

49 U.S.C. § 10762

§ 10762. General tariff requirements

(a)(1) A carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title [49 U.S.C.S. § 10501 *et seq.*] (except a motor common carrier) shall publish and file with the Commission tariffs containing the rates and (A) if a common carrier, classifications, rules, and practices related to those rates, and (B) if a contract carrier, rules and practices related to those rates, established under this chapter for transportation or service it may provide under this subtitle. A motor common carrier shall publish and file with the Commission tariffs containing the rates for transportation it may provide under this subtitle. The Commission may prescribe other information that motor common carriers shall include in their tariffs. A motor contract carrier that serves only one shipper and has provided continuous transportation to that shipper for at least one year may file only its minimum rates unless the Commission finds that filing of actual rates is required in the public interest.

(2) Carriers that publish tariffs under paragraph (1) of this subsection shall keep them open for public inspection. A rate contained in a tariff filed by a common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter II, III, or IV of chapter 105 [49 U.S.C.S. § 10521 *et seq.*, 10541 *et seq.*, or 10561 *et seq.*] shall be stated in money of the United States. A tariff filed by a motor or water contract carrier or by a freight forwarder providing transportation or service subject to the jurisdiction of the Commission under sub-

chapter II, III, or IV of that chapter [49 U.S.C.S. § 10521 *et seq.*, 10541 *et seq.*, or 10561 *et seq.*], respectively, may not become effective for 30 days after it is filed.

(b)(1) The Commission shall prescribe the form and manner of publishing, filing, and keeping tariffs open for public inspection under this section.

49 CFR Ch. X

§ 1312.30 Distance rates.

(a) *Distance rates may be filed.* Distance of mileage (hereafter referred to as distance) class or commodity rates may be filed.

(b) *Method of showing distances.* Distance rates may be published to apply per vehicle per mile, or other unit per mile, or by establishing a rate table or segment showing a scale of distances for which charges will be applied. If the latter method is used, a rate shall be provided for each distance. Each State or area covered by the application of the rates shall be listed. The listing may be brief but informative as to the territorial coverage.

(c) *Determination of Distances.* (1) A tariff containing distance rates shall contain provisions for the determination of distances by—

(i) Publishing the distances between all locations covered by the distance rates in the tariff;

(ii) Referring to a map(s) attached to the tariff; or

(iii) Referring to a distance guide(s).

(2) If maps are referred to, the rate tariff shall include a rule specifying the manner in which distances are obtained from maps. The rule shall include a definite means for determining distances between all locations within the territorial coverage of the rates, regardless of whether or not all the locations are shown on the map and regardless of whether or not actual distances are shown between all locations.

(3) When a map to a tariff is superseded by another, the new map shall be attached to and made a

part of a supplement to a bound tariff, or a looseleaf page to a looseleaf tariff, which shall specifically cancel the old map and give effect to the new.

(4) Except as provided in § 1312.13(e)(2), only distance guides officially on file with the Commission may be referred to. More than one may be referred to provided the rate tariff clearly specifies the circumstances under which each guide will apply. An agent's tariff may refer to another agent's distance guide.

(5) Distance guides shall provide diistance tables or combinations of tables and maps. Tables shall provide specific distances between a substantial number of the points and be shown as having precedence over the distances determined by the use of maps. Each guide shall provide rules stating its application. The rules shall include a means for determining distances between all locations with the territorial coverage of the guide, regardless of whether all the locations are shown in the guide or whether distances are shown between all locations. If distances between certain points or areas are to be determined only through a certain gateway or interchange point, those points or areas and the gateway or interchange point shall be identified. Distance guides filed in "paper" format may exceed the maximum size limitations imposed by § 1312.3 but may not exceed 14½ by 17½ inches in size. Carriers may file automated distance determination systems which are linked by reference in abbreviated distance guides or rate tariffs to computer stored information provided the following conditions are met:

(i) Carriers or their tariff publishing agents shall make arrangements with the Commission for the

receipt, storage and use of the systems through existing Commission technology and facilities.

(ii) In the event that a system is not compatible with Commission technology, the necessary implementing equipment and programs shall be placed on file with the Commission for use by Commission personnel and the public at no cost.

(iii) Proposed changes in the systems shall be given notice and reflect the nature of the change, as required by 49 U.S.C. 10762(c)(3) and § 1312.4(e) and § 1312.17(f). However, if an electronic distance determination system is not inherently capable of giving notice and symbolization of changes with the program, then printed tariff amendments to the distance guides or rate tariffs will be required. The amendments shall show the currently effective provisions as well as the proposed changes thereto.

(iv) The distance guides or rate tariffs shall provide all the information necessary to access and utilize the systems.

(6) Railroad distance rate tariffs or distance guides shall also provide:

(i) A list of the points between which the rates apply;

(ii) The shortest distances between those points;

(iii) An indication of which of those points are junction points where traffic may be interchanged without transfer of the lading; and

(iv) The names of the connecting carriers at each of those junctions.

(7) A rail carrier or its agent may file a separate tariff containing the information required by paragraph (c)(6) of this section to govern local rates. The distances shall be shown—

(i) Form each point to each point;

(ii) Form each point to each junction point; or

(iii) Form each junction point to each other junction point and from each point to the nearest junction point in each direction.

(8) An agent may file a separate tariff to govern joint rail rates. The distances shall be shown from each junction point to each other junction point and from each point to the nearest junction point in each direction. The latter distances need not be shown if the rate tariff refers to local distance tariffs of each carrier which contain the distances.

[49 FR 38615, Oct. 1, 1984, as amended at 53 FR 5983, Feb. 29, 1988]

49 CFR Ch. X

§ 1312.27 Classification, exceptions, rules, dangerous articles and station list tariffs.

* * * * *

(e) *Participation in governing publications.* Carriers participating in tariffs which refer to, and are governed by, separate tariffs (classifications, exceptions, rules etc.), shall also participate in those governing separate tariffs, unless specifically stated in the governed tariffs that provisions in the separate tariffs will not apply for their account. This does not require participation in local drayage tariffs or in terminal and special services tariffs applicable only for the issuing carrier. Carriers participating in a rate tariff solely to provide substituted service at another carrier's option need not participate in the governing tariffs. See § 1312.38.

§ 1312.10 Powers of attorney, concurrences, transfer of agent. [See also § 1312.4(d)]

(a) *Powers of attorney.* Powers of attorney may be given by a carrier to a carrier or an agent for the purpose of publishing and filing tariffs. A power of attorney may be given by Class III rail carriers to larger carriers with which they connect or by rail subsidiaries to parent rail carriers authorizing the larger or parent rail carriers to publish tariffs, to give and receive concurrences, and to give powers of attorney to agents on behalf of the Class III or subsidiary rail carrier. The power may be as broad or limited as expressed in the document, and alternate agents may be named. Powers of attorney shall not be filed at the Commission, but shall be maintained and produced if rquested by any person. Revocation or amendment of

the power of attorney should be reflected through lawfully published tariff revisions effective concurrently. In the event of failure to so revise the applicable tariff or tariffs, the rates in such tariff or tariffs will remain appalicable until lawfully changed. If the scope of a power of attorney is questioned by any person, the document shall be produced.

* * * * *

§ 1312.4 Filing tariffs.

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(d) *Concurrences and powers of attorney.* Concurrences and powers of attorney shall not be filed with the Commission. However, a carrier may not participate in a tariff issued in the name of another carrier or an agent unless a power of attorney or concurrence has been executed. Absent effective concurrences or powers of attorney, tariffs are void as a matter of law. Should a challenge to a tariff be made on this basis, carriers will be required to submit the necessary proof. See also § 1312.10.

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☆ U.S. GOVERNMENT PRINTING OFFICE: 1993—301-157/86037

(2)

FILED
DEC 30 1993
OFFICE OF THE CLERK

No. 93-883

In The

Supreme Court of the United States

October Term, 1993

INTERSTATE COMMERCE COMMISSION
AND UNITED STATES OF AMERICA,

Petitioners,

v.

OVERLAND EXPRESS, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In an action by a motor common carrier to collect its filed tariff charges may the Interstate Commerce Commission (hereinafter "ICC" or "Commission") declare the carrier's filed tariff retroactively void solely because the carrier had failed to comply with ICC regulations for the determination of distances?

LIST OF PARTIES

Respondent, Overland Express, Inc. (hereinafter "Overland") was an Indiana corporation previously engaged in common carrier transportation of freight in interstate commerce. Petitioners are the Interstate Commerce Commission and the United States of America.

The following were parties to the ICC proceeding: Jasper Wyman & Sons; Codep International; Creamette Co.; Lynn Plastics Corp.; Viviano Macaroni; Furniture Crafts, Inc.; Fibers & Fabrics of Georgia; Cotter & Co; Distribution Transportation Service, Inc.; Country Oven, Inc.; Grinnell Corp.; Purolator; Thompson Consumer; Rudy's Farm Co.; S.T. Semicon; General Motors Corp.; Kroger Co.; Drexel Co.; Alcan Aluminum Corp.; Bear Transportation; BI LO, Inc.; Charley Brothers; Warner Lambert, LTD; Davis Distribution; Life Savers, Inc.; Witco Corp.; Greenman Brothers; L.B. Transport; MSG Arlen Co.; Kraft, Inc.; MTI Freight Systems; Old Dutch Food, Inc.; Marathon Electric Manufacturing Corp.; and Preferred Products.*

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* Respondent is unaware of any parent or subsidiary companies listed for the corporations named in this list of parties.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 996 F.2d 356 (D.C. Cir. 1993). The decision of the Interstate Commerce Commission is reported at 8 I.C.C.2d 246 (1992). The text of both of the opinions below are appended to the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Overland concurs with Petitioners' statement of the case with the following exceptions. First, Petitioners improperly refer to the ICC's actions in voiding Overland's mileage based tariffs as enforcement of "long-standing ICC regulations . . . " *See* Petition at 2. However, the record below demonstrated that, during the 1980's, 40% of all carriers that filed mileage-based rates referenced the Household Goods Carriers Bureau (hereinafter "HGCB") Mileage Guide without participating therein. *See Overland*, 996 F.2d at 359. The ICC did not reject any of these allegedly defective tariffs. In addition, it was only after the issuance of the ICC's decision in *Jasper Wyman & Sons – Petition for Declaratory Order – Certain Rates and Practices of Overland Express, Inc.*, 8 I.C.C.2d 246 (1992), and after large numbers of shippers were faced with undercharge suits that the Commission attempted to utilize its regulations to retroactively reject carrier's tariffs for nonparticipation. *See, e.g., Overland*, 996 F.2d at 360, n.4.

Second, Petitioners note in paragraph 2 of their Statement that "[i]f a carrier fails to pay the fee for renewing its participation in the guide, *after a number of efforts* advising the carrier of the delinquency and the impending cancellation, HGCB [Household Goods Carriers Bureau] will delete its name as a participant in subsequent editions of the distance guide." *See* Petition at 4, n. 1 (emphasis added). However, the record below amply demonstrates that Overland never received any notice of its cancellation, and the Household Goods Carriers Bureau records show no evidence of ever having notified Overland of its delinquency.

REASONS FOR DENYING THE WRIT

The courts of appeal are divided in response to the question presented herein. On October 18, 1993, this Court granted the petition for writ of certiorari in *Security Services, Inc. v. K-Mart Corp.*, 996 F.2d 1516 (3d Cir. 1993), *cert. granted*, 1993 W.L. 345661, 62 U.S.L.W. 3165 (Oct. 18, 1993). As a result, Respondent opposes the issuance of a writ of certiorari at this time. Respondent concurs with Petitioners that should this Court grant a writ of certiorari, this case should be held in abeyance pending the resolution of the *K-Mart* case.

CONCLUSION

For the foregoing reasons, the Petition of the Interstate Commerce Commission and the United States of America should be denied, or in the alternative, held in abeyance pending the resolution of *Security Services, Inc. v. K-Mart Corp.*

Respectfully submitted,

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